Supreme Court, U.S.
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No. 04-592

In The

Supreme Court of the United States

MAMIE TANG,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether defendants whose cases were not yet final when *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004) was decided, should receive the benefits of *Blakely*.

II.

When evaluating whether the government has breached a plea agreement, should the Appellate Courts apply a *de novo* or a clearly erroneous standard of review.

LIST OF PARTIES

The parties to the proceedings below were the plaintiff, United States of America and the defendant-Petitioner, Mamie Tang. Ms. Tang's codefendant, John Hickey is still engaged in pretrial proceedings and is represented by Joseph Russoniello. Plaintiff is represented by Tim Crudo, Assistant United States Attorney for the Northern District of California (San Francisco).

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PRAYER

The Petitioner, Mamie Tang, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit decided June 23, 2004.[1]

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit denying Petitioner's appeal is unpublished, and is reprinted in the appendix hereto. (App. 1)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a)(1). This petition is filed within 90 days of the denial of the Petition for Rehearing and is timely under the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The VI Amendment to the Constitution of the United States, in relevant part, provides:

[1] On August 5, 2004, the Ninth Circuit denied Petitioners request for rehearing. (App. 4) Citations to "RT" refer to the Reporter's Transcript of the proceedings below. Citations to "ER" refer to the Excerpt of Record filed in the Ninth Circuit. Citations to "App." refer to the appendix to this petition for a writ of certiorari.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury . . .

The V Amendment to the Constitution of the United States, in relevant part, provides:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

I.

STATEMENT OF THE CASE

A. INTRODUCTION

1) The Sentence in this case was imposed in violation of this Court's Opinion in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004).

The Ninth Circuit issued the opinion in this case the day after this Court issued the opinion in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), and before the Ninth Circuit decided *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). Ms. Tang filed a Petition for Rehearing directing the Ninth Circuit's attention to this Court's Opinion in *Blakely*. That Petition was denied. Ms. Tang should not have to serve a sentence imposed in a manner this Court has indicated is improper.

Just as in *Blakely*, this is a case in which the enhancing facts "were neither admitted by [Tang] nor found by a jury." *Blakely*, 124 S.Ct. at 2537. This is exactly the type of case to which Justice Scalia referred when, in *Blakely*, he disapproved of a sentence "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it

wrong." *Id.* at 2542. Ms. Tang should not have to serve a sentence based upon a district court's guess as to the loss amount.

2) The Ninth Circuit used the wrong standard of review in evaluating the government's breach of the plea agreement.

In an effort to resolve this case, Mamie Tang entered into a Plea Agreement with the government. In return for that plea, however, the government promised: (1) she would not be sentenced prior to her codefendant, John Hickey; (2) not to use Ms. Tang's debriefing statements against her; and (3) not to oppose a two level downward adjustment for acceptance of responsibility. Nevertheless, the government opposed the downward adjustment for acceptance of responsibility; used statements Ms. Tang made at her debriefing against her at sentencing; and moved to have her sentenced prior to the trial of her codefendant. On appeal, the Ninth Circuit evaluated those breaches under a clearly erroneous standard, rather than applying a *de novo* standard of review.

This breach of her Plea Agreement and sentencing procedure violated the Court's rulings in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *Santobello v. New York*, 404 U.S. 257, 262 (1971).

B. PROCEDURAL BACKGROUND

On July 16, 1997, Mamie Tang and her codefendant John Hickey were indicted for mail and wire fraud in connection with a real estate development plan in Napa, California. During these proceedings, Ms. Tang's psychological condition was very frail, and it was difficult for her

to assist counsel or to fully participate in her defense. ER J, December 2, 2002, Wolf Declaration, 2.

On July 26, 1999, Ms. Tang was charged in a second indictment with obtaining a loan on partnership property for her own personal benefit.

While this, first, case is extraordinarily complicated and has not yet gone to trial against codefendant Hickey, the second case against Ms. Tang only, was set for trial to begin on March 16, 2000. Faced with an imminent trial in the second case, a plea in this case was negotiated which called for a dismissal of that second case. ER C, Plea Agreement, 14.

On March 15, 2000, Ms. Tang entered a guilty plea to count 30 of the Indictment in this case. ER D, Plea Transcript, p. 19.

The Plea Agreement allowed Ms. Tang to plead guilty to one count, to cooperate in the prosecution of her codefendant, Hickey; and to seek a downward departure for that cooperation. As her lawyer at that time stated in a declaration filed in support of a motion to enforce the plea agreement, "[s]pecifically we discussed and agreed that Ms. Tang would not be sentenced before Mr. Hickey." ER J, December 2, 2002, Wolf Declaration.

Ms. Tang's understanding of her plea agreement was similar to her lawyer's. Ms. Tang stated in a declaration that she understood:

> I would be given the opportunity to reduce my sentence by cooperating against John Hickey.
>
> I was told that if I entered a guilty plea I would receive a shorter sentence than John Hickey would receive.

> I was specifically told that I would not be sentenced until after the trial and sentencing of John Hickey.
>
> I would never have entered a plea unless I had been told that I would be sentenced after John Hickey and that I would receive a shorter sentence than Hickey would receive.

ER O, Motion to Enforce Plea Agreement, Exhibit A.

Ms. Tang's and her counsel's understanding of the terms of her plea agreement is reinforced by the on-the-record representations of the Assistant United States Attorney that her sentencing would not occur until after her codefendant's trial. During the plea proceedings, the Assistant United States Attorney specifically stated that "we would not anticipate sentencing before a trial which is set for September" (ER D, Plea Transcript, p. 20), and again "we would not anticipate Ms. Tang's sentencing to go forward before that trial." *Id.* at p. 21.

Nevertheless, prior to the trial of Mr. Hickey, the government sought to advance the sentencing of Ms. Tang over her objection; and on March 21, 2003, the District court proceeded to sentence Ms. Tang to 57 months in federal custody to be followed by three years of supervised release. ER W, Sentencing Transcript, p. 96; ER Y, (Amended) Judgment.

At sentencing, a major point of disagreement between the parties was the amount of loss. The government contended that Ms. Tang was responsible for a loss of more than $20,000,000. ER W, Sentencing Transcript, p. 40. The defense contended that the government had failed to prove any loss, but that at worst the government had shown that Ms. Tang was responsible for no more than $1,374,000, the

amount determined by another district judge in a companion civil case (ER E, June 30, 2000, Order; ER P, Objections to PSI, pp. 4-6; ER R, Reply to United States' Sentencing Memorandum, pp. 2-4; ER V, Reply to Government's Sentencing Memorandum, p. 4), minus Ms. Tang's contributions to the project, or an amount less than $600,000. ER R, Reply to United States' Sentencing Memorandum, pp. 3-4.

At sentencing, the District court described the process of calculation of the loss as "water torture," and the government agreed with that characterization. ER W, Sentencing Transcript, p. 93. The District court recognized that at the time Ms. Tang entered her plea, no one anticipated that the calculation of loss would become such a complicated issue. ER W, Sentencing Transcript, p. 53. The District court initially attempted to analyze what loss Ms. Tang admitted by her plea and in her debriefings, but was unable to determine a "hard" loss figure. ER W, Sentencing Transcript, p. 66.[2] Nevertheless, the District court expressed its desire to complete Ms. Tang's sentencing, stating: "I hate to have you come back. I'm so tired of everyone dealing with these issues time and time again, by the time we ever get through it, the whole issue of whether we should have waited for Mr. Hickey may become moot." ER W, Sentencing Transcript, p. 66.

The Court expressly noted:

> I'm not sure I really have any evidence before me as to how the figures were arrived at by the government; in other words, the government has

[2] Counsel for Tang objected to the inclusion of information from Ms. Tang's debriefings in the loss calculation. ER W, Sentencing Transcript, p. 56.

> represented that the receiver figured this out, but I don't know that I have any kind of declaration from the receiver saying, I figured this out, this is what it came out to.

ER W, Sentencing Transcript, p. 31.

Toward the end of the sentencing the District court again commented:

> I don't know if this is just a failed investment or a misapplication of funds . . . [and] I just don't even know what I have in front of me anymore because of the limited plea that occurred here and all of these various transactions.

ER W, Sentencing Transcript, p. 66.

Despite these uncertainties, the district court adopted the position of the probation office and calculated the "loss" based upon the total amount of funds raised by both Hickey and Tang, ER P, Objections to PSI, p. 5, pretending "for argument's sake" the loss was more than 10 Million but less than 20 Million. ER W, Sentencing Transcript, p. 67 (emphasis added)

The loss calculation significantly affected Ms. Tang's sentence, raising her guidelines fifteen levels from the base level of six. At that level, Ms. Tang would have been eligible for probation.

On March 31, 2003, Ms. Tang filed a Notice of Appeal of that sentence. ER X, Notice Of Appeal. On June 23, 2004, the Ninth Circuit denied that appeal. Ms. Tang filed a Petition for Rehearing, arguing that the panel had applied the wrong standard of review and that the loss calculation in her case violated this Court's *Blakely* decision.

On August 5, 2004, the Ninth Circuit issued an order stating it had considered and denied Ms. Tang's petition for rehearing. App. 4.

II.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

As many Courts and Commentators have recognized,[3] *Blakely v. Washington* fundamentally altered the criminal sentencing landscape. This case provides this Court with the opportunity to indicate which defendants may take advantage of the *Blakely* holding. As Justice O'Connor, joined by three other Justices, stated in *Blakely*, "Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy." Although *Blakely* was decided the very next day after the Ninth Circuit issued its initial decision in this case, and before this case was final, the Ninth Circuit ignored this Court's *Blakely* ruling when Ms. Tang filed a Petition for Rehearing.

In *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) this Court granted certiorari because a panel of the Ninth Circuit had recited principals previously set out by this Court, but found that the Ninth Circuits application of those principals was "nothing short of baffling." *Id.* at 510. Here, the Ninth Circuit ignored the application of this Court's decision in *Blakely* to the

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[3] Professor Douglas Berman the operator of a widely read blog, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/, has done a remarkable job of chronicling the different efforts underway in almost all Federal and State Courts to rationally follow this Court's decision in *Blakely*.

question of the determination of loss under the sentencing guidelines.

According to the official website of the United States Sentencing Commission, http://www.ussguide.com/members/BulletinBoard/Blakely/BlakelyCases.pdf, as of October 29, 2004, there were 415 reported cases dealing with how to apply this Court's *Blakely* decisions to the Federal Sentencing Process.

Those efforts range from one Ninth Circuit panel's decision that the guidelines, are constitutional, but that sentencing factors must be decided by a jury, in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004); through the Second Circuit's *en banc* certification of issues to this Court in *United States v. Penaranda*, 375 F.3d 238 (2nd Cir. 2004); through the Fifth and Sixth Circuits' decisions that the guidelines are not affected by *Blakely* in *United States v. Pinero*, 377 F.3d 464 (5th Cir. 1991); *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004); through the Fourth Circuit's decision in *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004) holding that the Guidelines are constitutional, but directing district courts to impose alternative sentences; and pausing, (for litigation over the Guidelines, no matter what this Court holds in *United States v. Booker*, 2004 WL 1713654 (U.S.) and *United States v. Fanfan*, 2004 WL 1713655 (U.S.) will probably never end), with an interesting new analysis that the Guidelines, as amended by the recent PROTECT Act and Feeney Amendment, P.L. 108-21 act violate the Separation of Powers Clause. *United States v. Detwiler*, ___ F. Supp. ___ (W. D. Wash. 2004); 2004 WL 2244532 (D.Or. 2004).

While these decisions are not consistent and come to very different conclusions, one feature stands out; the vast

majority of Courts when confronted with *Blakely* issues have tried to address those issues in a rational process. In this case, the *Blakely* issues were simply ignored. Petitioner assumes, and the cases cited above demonstrate, that whatever the result of cases such as *United States v. Booker*, 2004 WL 1713654 (U.S.), 73 USLW 3073, 73 USLW 3074 and *United States v. Fanfan*, 2004 WL 1713655 (U.S.), argued before this Court on October 4, 2004, the Courts will develop an orderly process for individuals who have raised *Blakely* claims before their convictions were final. Ms. Tang should not be excluded from that process, simply because one panel of the Ninth Circuit, for what ever unknown reason, decided not to address her substantial *Blakely* claims.

Equally important is the question of the standard of review for claims that the government has breached a plea agreement. The vast majority of criminal cases are resolved via a plea bargain and this case also provides this Court with an opportunity to determine the appropriate standard of review for sentencing claims involving a plea bargain.

B. PETITIONER'S SENTENCE WAS BASED UPON AN ESTIMATE BY THE JUDGE, RATHER THAN FACTS DETERMINED BY A JURY

Although the panel's opinion stated that the government had not breached Ms. Tang's Plea Agreement, the panel specifically stated that:

> [e]ven if there was a breach, the district court did not err in calculating the amount of loss pursuant to U.S.S.G. § 2F1.1 (deleted by consolidation with 2B1.1, November 1, 2001).

9th Cir. Slip Opinion p. 3 (June 23, 2004). App. 2-3.

In *Blakely*, Justice O'Connor specifically singled out enhancements for the amount of loss as enhancements that can not survive *Blakely*:

> This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. *See e.g.*, USSG § 2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); § 2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon)

Blakely, 124 S.Ct. at 2550 (O'Connor, J., dissenting).[4]

This case presents precisely the situation to which Justice Scalia referred in *Blakely*, a sentence "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the Judge thinks more likely got it right than got it wrong." *Blakely v. Washington*, 124 S.Ct. 2531, 2542 (2004). Ms. Tang's case is not yet final. Accordingly, she should receive the benefit of this Court's decision in *Blakely*.

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[4] This portion of Justice O'Connor's opinion was joined by Justice Breyer.

C. THE STANDARD OF REVIEW THE NINTH CIRCUIT USED IN THIS CASE IS IN CONFLICT WITH THE STANDARDS OF REVIEW APPLIED IN OTHER NINTH CIRCUIT CASES AND USED IN OTHER CIRCUITS

Apart from the sentencing issues this case presents, the Ninth Circuit used the wrong standard of review to determine whether the government breached the Plea Agreement. The standard of review for plea agreements is an important issue because the vast majority of criminal cases end in a plea agreement. How those agreements are evaluated on appeal affects each appealing defendant and bears upon the workload of the courts, particularly now that the appellate courts are being subjected to an avalanche of *Blakely* appeals.

Both this Court in *Koon v. United States*, 518 U.S. 82 (1966) and Congress in the PROTECT Act, 18 U.S.C. § 3742, have recognized that the standard of review for sentencing issues makes a significant difference. This Court has not set out the appropriate standard of review for claims of a breach of a plea agreement, and that standard is the subject of both intra and inter Circuit conflict.

The importance of the standard of review for claims of a breached plea agreement is demonstrated by the Third Circuit's recent *en banc* opinion, *United States v. Rivera*, 365 F.3d 213 (3rd Cir. 2004) (*en banc*), where the Third Circuit attempted to clarify the standard of review for claims of a breached plea agreement.

Unlike the Third Circuit which has attempted to clarify this important issue, the Ninth Circuit has repeatedly recognized it has applied an inconsistent standard of

review, but has not taken any steps to settle this intra Circuit conflict. *United States v. Johnson*, 187 F. 3d 1129, 1134 (9th Cir. 1999) ("The Ninth Circuit has been inconsistent in its standards for reviewing a claim that the government has breached a plea agreement."); *United States v. Franco-Lopez*, 312 F.3d 984, 988 (9th Cir. 2002) ("our standard of review for a district court's determination concerning an alleged breach of a plea agreement has been 'inconsistent.'")

The District of Columbia, Fourth, Seventh, Eighth, Eleventh and some panels of the Ninth Circuit have applied a clearly erroneous standard to claims of a breached plea agreement. *See, e.g., see also In re Sealed Case*, 356 F.3d 313 (D.C.Cir. 2004); *United States v. Conner*, 930 F.2d 1073, 1076-77 (4th Cir. 1991); *United States v. Ataya*, 864 F.2d 1324, 1327 (7th Cir. 1988); *United States v. Minnesota Mining and Mfg. Co.*, 551 F.2d 1106, 1109-1110 (8th Cir. 1977); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990); *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980); *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983).

The First, Second, Third, Tenth and other panels of the Ninth Circuit, however, have applied a *de novo* standard of review. *See, e.g., United States v. Clark*, 55 F.3d 9, 11 (1st Cir. 1995); *United States v. Lawlor*, 168 F.3d 633, 636 (2nd Cir. 1999);[5] *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3rd Cir. 1989); *United States v. Rivera*, 365 F.3d 213 (3rd Cir. 2004) (*en banc*); *United States v. Peterson*, 225 F.3d 1167, 1170 (10th Cir. 2000); *United*

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[5] *Lawlor* applies the *de novo* standard, but does not expressly use the term "*de novo*."

States v. Diamond, 53 F.3d 249, 252 (9th Cir. 1995); *United States v. Myers*, 32 F.3d 411, 413 (9th Cir. 1994).

Only this Court may rectify this split among the Circuits and in the Ninth Circuit.[6]

The issue of the appropriate standard of review is especially important at this post *Blakely* period. Because the Circuits are divided as to the appropriate standard of review for the breach of a plea agreement, and because the Circuits are divided as to the application of this Court's recent decision in *Blakely*, this case is an appropriate case for this Court to grant certiorari.

CONCLUSION

This case provides the Court with an opportunity to address two issues that will continue to arise in the course of the administration of criminal sentencing: how to apply *Blakely* to cases that were not yet final, and what is the standard of proof to use when evaluating compliance with plea agreements. Accordingly, we request this Petition for Certiorari be granted.

Dated: November 3, 2004

Respectfully submitted,

CHRISTOPHER J. CANNON
Attorney for Mamie Tang

[6] As indicated above, the Ninth Circuit has noted that it applies inconsistent standards of review, but has not convened an *en banc* court to harmonize its opinions.

103 Fed.Appx. 121, 2001 WL 1416387 (9th Cir. (Cal.))

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.
Mamie TANG, Defendant – Appellant.

No. 03-10170.

Argued and Submitted June 14, 2004.
Decided June 23, 2004.

Robin Harris, AUSA, Office Of The U.S. Attorney, Timothy P. Crudo, Esq., Latham & Watkins, LLP, San Francisco, CA, for Plaintiff-Appellee.

Christopher J. Cannon, Esq., Sugarman & Cannon, San Francisco, CA, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of California, Maxine M. Chesney, District Judge, Presiding. D.C. No. CR-97-00218-MMC.

Before: LAY,* HAWKINS, and BYBEE, Circuit Judges.

MEMORANDUM**

Mamie Tang ("Tang") waived her right to appeal in a written plea agreement. Because the Government did not breach the plea agreement, Tang cannot appeal her

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

sentence. *Cf. United States v. Gonzalez,* 16 F.3d 985, 990 (9th Cir.1993) (defendant released from waiver of right to appeal by government's breach of plea agreement).

The district court's factual finding that there was no agreement between the Government and Tang that Tang be sentenced after her co-conspirator was not clearly erroneous. *See United States v. Elliott*, 322 F.3d 710, 714 (9th Cir.2003) (under the "significantly deferential" clear error standard, we may reverse only if left with the "definite and firm conviction that a mistake has been committed.") (internal quotations and citations omitted).

Similarly, the Government did not breach the plea agreement when it opposed a downward adjustment for acceptance of responsibility. The Government agreed, based on the information available to it at the time, not to oppose the adjustment for Tang's acceptance of responsibility. This agreement became inapplicable when the Government learned new, material information about Tang's failure to accept responsibility. *See United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir.1993) (traditional contract law principles usually apply to plea agreements).

Additionally, the Government's use of statements at sentencing that Tang made while cooperating with the Government did not breach the plea agreement because Tang opened the door by introducing the statements into evidence. *See United States v. Williams,* 939 F.2d 721, 723-25 (9th Cir.1991) (defendant who introduced evidence of a prior conviction could not later appeal admission of that evidence).

Therefore, the Government did not breach the agreement and Tang may not appeal. Additionally, even if there was a breach, the district court did not err in calculating

the amount of loss pursuant to U.S.S.G. § 2F1.1 (deleted by consolidation with 2B1.1, November 1, 2001). *See United States v. Amlani,* 111 F.3d 705, 719 (9th Cir.1997).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAMIE TANG, Defendant-Appellant.	No. 03-10170 D.C. No. CR-97-00218-MMC Northern District of California, San Francisco ORDER (Filed Aug. 5, 2004)

Before: LAY, HAWKINS, and BYBEE, Circuit Judges.

Appellant's Petition for Rehearing has been considered and it is DENIED.